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Article

Restoring Administrations of Justice in Early Practice: American-Occupied Germany 1945-1949

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Abstract

This work examines the reconstruction of the administration of justice in the American occupation zone after the end of the Second World War, as an example of one of the first times in history when this process was attempted. All German governmental institutions had collapsed following the unconditional surrender of the National Socialist regime. The American military government thereafter sought to reconstruct German judicial institutions in the consequent vacuum in its occupation zone. Occupation law, U.S. military government courts and measures for the restoration of justice were instituted while the states of the zone were re-established. State judicial organisations were restored simultaneously in the form of the denazification of German law and re-opening German courts while judicial personnel were vetted before staffing the administration of justice. The state judicial organisations regained independence as jurisdictional responsibility was transferred to them until the end of the military occupation and the Federal Republic of Germany was established.

Introduction

Restoring an administration of justice is a requirement of successful regime change, whether through military occupation as in Germany in 1945 or as in Eastern European states in 1989. The nature of the administration of justice changes according to new ideological tenets after transitions. In the case of post-war Germany, the authority of the occupying powers during the Allied military occupation was complete. This led to re-establishing a completely reconstructed administration of justice, barring the transition of personnel from the previous regime. This work

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examines the process by which the administration of justice was restored under the supervision of American military government authorities until German sovereignty was re-established and how institutional safeguards checked potential abuses of judicial authority. Restoring administrations of justice entailed reconstructing judicial institutions, while determining how the personnel reconstruction for staffing these institutions would be undertaken was a separate problem that took place simultaneously. This was a twofold engagement: imposing a framework of legal structures borrowed from pre-1933 and later post-1945 military governance, and the vetting through the denazification of German jurists who were to operate under this framework after independent judicial organisations were restored Although the thorough denazification of judicial personnel that had been envisaged at the beginning of the military occupation was not accomplished, the rule of law in American occupied post-war Germany was successfully re-established regardless of the shortcomings of the personnel reconstruction. The institutions of the administration of justice as an integral component of a democratic state thus took precedence over the human element of the post-war reconstruction of justice.

Reconstructing the German administration of justice was an integral part of the transition from the National Socialist dictatorship to the rule of law in post-war Germany. All German institutions ceased to function at the end of the Second World War, thus beginning with a standstill of justice, followed by the subsequent reconstitution of the German judicial organisation and the restoration of its functions while the restoration of the German justice system was guided under Allied military government legislation. [1] German court jurisdiction was widened during the occupation through either amendment of occupation law or administrative revision of the categories of cases to be withdrawn from the jurisdiction of German courts[2] until the rule of law was restored. The unconditional surrender of the National Socialist regime created a political vacuum that was filled by the supreme authority of the Allied occupation powers. This transition thus removed the basis of state sovereignty, and consequently eliminated the jurisdiction of the German judicial organisation.[3] The Allied military governments initially assumed the responsibilities of all governmental functions and established a provisional justice system with their own laws and courts in the separate occupation zones. Within this post-war administration of authority, the American military government authorities initially provided the sole

[1] H. Ruscheweyh, 'Die Entwicklung der hanseatischen Justiz nach der Kapitulation bis zur Errichtung des Zentral-Justizamtes', in *Festschrift für Wilhelm Kiesselbach*, Hamburg: Gesetz und Recht Verlag 1947, p.39.
[2] Z45F 11/5-2/1, Bundesarchiv Koblenz. OMGUS, LD. Legal Division History.
[3] H. von Weber, 'Der Einfluß der Militärstrafgerichtsbarkeit der Besatzungsmacht auf die deutsche Strafgerichtsbarkeit', *Süddeutsche Juristenzeitung* 1947-Vol.2, pp.65-70.

source of law and political authority and restored self-governing Land (state) governments in American occupied post-war Germany, thus establishing separate regional jurisdictions that functioned independently of a central national government. This was in keeping with the Potsdam Protocol principle of decentralising the German political structures and developing local responsibility, which was believed to be conducive to democratisation.[4]

The restoration of justice under the auspices of the American military government proceeded gradually, since there was no structured approach or tested formula for achieving such a restoration. [5] The process of restoring justice in Germany began with suspending the administration of justice and legislating National Socialist laws out of existence, which was proceeded by abolishing courts that would be unacceptable in a democratic constitutional state, and then continued by gradually restoring responsibility to a reconstructed German judicial organisation under the supervision of the U.S. military government. German administrations of justice in American occupied Germany began to operate under the supervision of the Land Ministry of Justice and the American military government. The constitutions and functions of the Land judicial organisations in American occupied Germany were regulated under the "Plan for the Administration of Justice" for the separate Land administrations of justice. Legislation promulgated by the Allied Control Council serving as the supreme executive authority in Germany as a whole, and the American military government governing the American military occupation zone further outlined the principles for the administration of the post-war administration of justice, and set forth regulations for the composition of German courts and their jurisdictions in the states of Hesse, Württemberg-Baden and Bavaria.

After reopening German courts at the Land level, the operating conditions of the justice system were restored, extending the jurisdictions and lifting the supervision of German courts, thus fully restoring judicial independence. While Allied military government legislation established uniform principles for the administration of justice in Germany as a whole, American military government and German Land legislation prescribed the law to be applied by the German judicial organisation at the Land level. The division of jurisdiction between the military government and the German judicial organisation was gradually narrowed, as greater numbers of cases were transferred to German courts. Safeguards against future violations concerning the interpretation and application of law by judges were introduced into German law

[4] K. Loewenstein, 'Law and the Legislative Process in Occupied Germany', *Yale Law Journal* 1948-Vol. 57, p.1022.
[5] Ibid, p. 995.

while the American military government focused on restoring responsibility to German judges.

Part of the restoration process was eradicating the influences of National Socialism. This denazification process was concerned with both enactments and those who would administer them, as Allied Control Council and American military government implemented legislative measures for the reconstruction of justice and eradicating the influences of National Socialism. Ernst Fraenkel defined this situation as the division between the "normative" legal state and the "prerogative" driven one. The first continued to provide a degree of continuity in protecting those legal statutes the regime chose to retain, while the second ensured the administration of justice was placed at the disposal of the regime and furthered its ideology.[6] The National Socialist regime had subverted the law, thus making the administration of justice operate within a dual state in which routine legal matters, especially in the civil matters, could continue much as before, while criminal law was to be applied to uphold the regime's interests. The regime accrued extended powers through legislation establishing a dictatorship and supplanting the principles of the Rechtsstaat - a constitutional government subject to the rule of law.

Jurists who were to staff the reconstituted Land administration of justice were vetted through denazification processes to identify qualified jurists not compromised by their involvement in the National Socialist regime who could staff the reconstituted Land administrations of justice. Whereas scholars including Justus Fürstenau, Lutz Niethammer, Constantine Fitzgibbon and Perry Biddiscombe have elucidated the failures of the denazification to remove tainted individuals from positions of authority,[7] the question remains whether reinstated judicial personnel endangered post-war democracy. In practice, the post-war administration of justice ultimately inherited by the Federal Republic of Germany was safeguarded by the application and enforcement of legislation, rather than long-term removal of politically-implicated personnel.

I. The Reconstruction of the Administration of Justice

The process of reconstructing the administration of justice began at the Land level with the implementation of occupation law. Allied military forces imposed a standstill

[6] E. Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. Lowenstein, E. Shils & K. Knorr, New York: The Lawbook Exchange 2010, p. 136.
[7] P. Biddiscombe, *The Denazification of Germany: A History, 1945-1950*, Stroud: Tempus 2007, pp.10-15.

of justice upon their advance into Germany.[8] Military government detachments also introduced the initial framework for a provisional justice system on the basis of legislation introduced on 18 September 1944[9] on the abrogation of National Socialist law, German courts, the jurisdiction of military government courts, and the composition of military government courts[10] that administered justice while jurists operating German courts could not be trusted after twelve years of National Socialism.[11] These early legislative measures also exemplified the difference between National Socialism and democracy by giving fair and impartial trials to all who stood before them. The problem for which both remedies regarding judicial personnel and organisations were required was essentially a unitary one: the judicial system had become subverted to the ends of National Socialism in accordance both with Adolf Hitler's "animus of the judiciary"[12] and the policy of "synchronisation" requiring the administration of justice and the decisions taken from within it to be re-modelled in conformance to National Socialist ideology and Hitler's will.[13]

The Law for the Protection of the People and State of 28 February 1933 suspended all civil liberties and declared a permanent state of emergency in Germany, and the Enabling Act of 24 March 1933 effectively removed all of the safeguards of a democratic administration of justice,[14] including the requirement that evidence be presented to substantiate infringement of a given law. It allowed the NSDAP to suspend all legislative procedure prescribed by the constitution, and allowed the regime to enact legislation that deviated from the constitution.[15] Whereas the constitutionality of legislation in the Weimar Republic had been ensured by parliamentary proceedings and the law conforming to the principles of the constitution,[16] this Act empowered the NSDAP to rule by decree and contrive the principles of constitutional government with impunity.

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[8] H. Breuning, 'Die Beschränkung der deutschen Gerichtsbarkeit durch die Besatzungsmächte', (Diss.: Eberhards-Karls-Universität zu Tübingen, 1952), p.10.

[9] E. E. Nobleman, 'American Military Government Courts in Germany', *American Journal of International Law* 1946-Vol. 40, p. 804.

[10] E.E. Nobleman, 'The Administration of Justice in the United States Zone in Germany', *Federal Bar Journal* 1946- Vol. 8, p. 70; Military Government Gazette, Germany, United States Zone, 1 June 1946- Issue A, p. 1.

[11] E.E. Nobleman, 'Military Government Courts: Law and Justice in the American Zone of Germany', *American Bar Association Journal* 1946-Vol. 33, p. 851.

[12] M. Burleigh, *The Third Reich: A New History*, London: Macmillan 2000, p. 152.

[13] M. Stolleis, 'In the Belly of the Beast: Constitutional Legal Theory and National Socialism', in M. Stolleis (ed.) *The Law under National Socialism*, Chicago: Chicago University Press 1998, p. 35.

[14] Burleigh, *The Third Reich: A New History*, p. 155.

[15] "Gesetz zur Behebung der Not von Volk und Reich," 24 March 1933, *Reichsgesetzblatt*.I 1933: 141.

[16] L. Gruchmann, 'Rechtssystem und nationalsozialistische Justizpolitik', in M. Broszat & H.Möller (eds.) *Das Dritte Reich: Herrschaftsstruktur und Geschichte*, München: Verlag C. H. Beck 1983, p. 96.

The principal problem facing the occupying powers was not an absence of law, but a capricious abuse of legal principles to further the regime's interests. The second problem was that the focus of the denazification process was based on the concept of lustration to exclude jurists compromised by or complicit in the National Socialist regime, and to enforce their exclusion from judicial organisations. While the judicial system could be purged of National Socialist legislation, identifying compromised jurists, assessing their level of complicity, and operating a judicial system either with their continued presence or in their absence proved a greater challenge.

Additional terms for the administration of justice were set forth to govern the function of German courts when they would be reopened. The U.S. military government claimed the power to dismiss any German judge or prosecuting attorney, to disbar any lawyer or notary from practice, and to supervise the proceedings of and to review, modify, or commute the decisions of German courts.[17] The power to commute or modify sentences represented the greatest form of intervention into the independence of the German judicial organisation.[18] The initial basis for such intervention was to ensure German jurists complied with the policies of the occupation powers,[19] empowering the military government with the authority to supersede all existing requirements under German law.[20]

SHAEF military government detachments also issued instructions for the application of criminal law by German judges[21] prior to the reopening of German courts. Judges were instructed to obey and enforce all military government legislation, and observe the limitations on the jurisdiction of German courts that were imposed on them,[22] including observing any provisions of the German Criminal Code that required prior authorisation from the military government. Both jurists and other court personnel were also subject to review at any time. Any attempt to perpetuate the lawlessness and abuses of the National Socialist regime or to perpetuate National Socialist ideology would be punished.[23] These instructions were to serve the primary purpose

[17] 'Law No. 2: German Courts', *Military Government Gazette*, 1 June 1946 - Issue A, pp. 7-10.
[18] Breuning, 'Die Beschränkung der deutschen Gerichtsbarkeit', p. 25.
[19] 'Das Besatzungsregime auf dem Gebiet der Rechtspflege', Tübingen: Institut für Besatzungsfragen Tübingen, 15 November 1949:5, pp. 27-28.
[20] 'Law No. 6: Dispensation by Act of Military Government with Necessity of Compliance with German Law', *Military Government Gazette*, 1 June 1946 - Issue A, p. 19.
[21] Von Weber, 'Die Bedeutung der "Allgemeinen Anweisung an Richter" Nr. 1', *Süddeutsche Juristenzeitung* (1946), p. 238.
[22] 'Law No. 2: German Courts', Art. 6 Para. 10 *Military Government Gazette*, 1 June 1946 - Issue A, pp. 7-10.
[23] Z45F 117/56-7/7, Bundesarchiv Koblenz. Legal Form IJ 1 LA 9 – Military Government – Germany, Supreme Commander's Area of Control, Instruction to Judges No. 1.

of maintaining the application of German law in accordance with the standards that had been in place during the Weimar Republic,[24] and thereby effect the abolition of National Socialist legislation.

The Allied occupation of Germany had a twofold effect on the German administration of justice. Firstly, the limitation of the jurisdiction of the German judicial organisation and the control of the German administration of justice while a foreign court jurisdiction operated alongside, which allowed for intervention in the German judicial organisation. Secondly, occupation court jurisdiction was exercised separately by the military occupation authorities[25] until all vestiges of National Socialism would be eliminated from the German administration of justice. The American military government thus followed the principle that the law of the occupied territory during the occupation continued in effect as suspended or modified through military government legislation, or by legislative action of German authorities exercising power conferred on them by the military government.[26] This situation effected a principle of international law, under which every military occupation power introduces its own law, setting forth a body of law that remains separate from the law of the occupied territory, and also extends its jurisdiction beyond the direct interests of the occupation.[27]

Until German court jurisdictions were restored, American military government courts applied German criminal law,[28] operating under the direction of a compendium of laws, judicial organisations, and trial procedures to guide them.[29] They did not deal with civil cases, which were reserved for German criminal courts whenever conditions would allow them to reopen. These military government courts were also regarded as the most important instruments for shaping relations between the German population and the occupation forces. By enforcing the authority claimed by military government legislation fairly and impartially, they exemplified the differences between National Socialism and democracy by giving fair and impartial trials to all who stood before them.[30] In practice, this demonstrated the principle that the application of immediate

[24] Von Weber, 'Die Bedeutung der "Allgemeinen Anweisung an Richter" Nr. 1', pp. 238-239.
[25] 'Das Besatzungsregime auf dem Gebiet der Rechtspflege', p. 4.
[26] E. E. Nobleman, 'The Administration of Justice in the United States Zone of Germany', *Federal Bar Journal* 1946-8, p. 74.
[27] Breuning, 'Die Beschränkung der deutschen Gerichtsbarkeit', p.11.
[28] Von Weber, 'Der Einfluß der Militärstrafgerichtsbarkeit der Besatzungsmacht', p. 65.
[29] J. R. Starr, *Denazification, Occupation and Control of Germany*, March-July 1945, Salisbury: Documentary Publications 1977, p. 118.
[30] E. F. Ziemke, *The U.S. Army in the Occupation of Germany: 1944–1946*, Washington D.C.: Center of Military History 1975, United States Army, p. 144.

and impartial law embeds the new regime, and undermines vestiges of loyalty that might remain to the old.[31]

Permanent German judicial organisations were established at the Land level in American occupied Germany following the creation of the Länder on 19 September 1945, constituting the territories of Bavaria, Württemberg-Baden, and the new Land of Greater Hesse.[32] Each of these Länder was established as the highest German administrative unit,[33] and marked a step toward accomplishing the American military government objective of decentralising the governmental structure of Germany.[34] While the military government courts functioned throughout the occupation before and during the restoration of the German judicial organisation in each of the Länder, the exercise of court jurisdiction was divided between German and American military government judicial organisations in each Land. After the reconstitution of Land administrations, the jurisdiction of German legislative authority was restricted by the American military government, which in turn would transfer legislation to be applied by the German judicial organisation in each separate Land.

The American military government would supervise the various tasks of post-war reconstruction in the separate Länder,[35]and the Länder governments would oversee the reconstruction of justice[36] thereafter, insofar as the powers conferred upon the Land governments by the regional Land military government offices would enable them to enact measures for that purpose. Existing German law was to remain in force until it was repealed or suspended by new legislation enacted by either the Allied Control Council or the American military government.[37]

Allied Control Council measures for the reconstruction of justice in Germany essentially continued those that previously had been introduced by the American military government in the Länder under its jurisdiction. Legislative reforms continued at the national, or Control Council, level. There reforms were adopted on a quadripartite basis and carried out in the four occupation zones by their respective military governments. These reforms took place concurrently with the development of political authorities and judicial organisations at the zonal and Land levels. Control

[31] L. Stan, *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, London: Routledge 2010, p. 263.
[32] 'Proclamation No. 2', Military Government Gazette, 1 June 1946 – Issue A, pp. 2-3.
[33] B. Diestelkamp, 'Rechts- und verfassungsgeschichtliche Probleme zur Frühgeschichte der Bundesrepublik Deutschland', *Juristische Schulung* 1980, p. 793.
[34] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No. 3.
[35] L. D. Clay, *Decision in Germany*, Garden City: Doubleday & Company 1950, p. 55.
[36] H. Wrobel, *Verurteilt zur Demokratie: Justiz und Justizpolitik in Deutschland 1945–1949*, Heidelberg: Decker & Müller 1989, p. 111.
[37] 'Proclamation No. 2', *Military Government Gazette*, 1 June 1946 - Issue A, pp. 2-3.

Council laws dealt with the abolition of National Socialist laws and the liquidation of National Socialist institutions and extraordinary courts.[38] Reconstituted German courts also assumed responsibility for applying German law according to the standards set by the general suspending clauses introduced by Allied Control Council and U.S. military government legislation against applying discriminatory provisions in any German law.[39] This legislation also superseded enactments issued by the separate Allied military government commanders and German law,[40] and set forth the basis for a democratic administration of justice.[41]

Control Council legislation also re-established the constitution and defined the responsibilities of the ordinary law courts, restoring the jurisdiction of German courts in accordance with the legal situation that had been in place before 30 January 1933.[42] Meanwhile, each occupation power was empowered with withdrawing selected criminal and civil cases from the jurisdiction of German courts. This separation of interests from the jurisdiction of the German judicial organisation[43] was maintained until types of cases would be restored to the jurisdiction of the German courts along with the course reinstituting democratic German regional governments.

Military Government Law No. 2, applicable in American occupied Germany, and Control Council Law No. 4 of 30 October 1945, applicable in Germany as a whole, set forth the initial basis for matters that lay outside the jurisdiction of the German judicial organisation.[44] These matters mainly concerned cases involving crimes and offences committed by individuals who would normally be subject to trial in a German court, and criminal cases involving offences against occupation law. Cases involving occupation forces, or any UN or nationals serving with or accompanying occupation personnel, were excluded from the jurisdiction of German courts.[45]

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[38] *Report of the Military Government, U.S. Zone*, 20 August 1945, No. 1.
[39] Z45F 17/199-3/41 RG 260/OMGUS, Koblenz Bundesarchiv. Provenance OMGUS: LD/AJ Br. Folder Title: 'Denazification of Judges and Prosecutors in the German Ordinary Courts', 4 June 1947.
[40] K. Loewenstein, 'Political Reconstruction in Germany, Zonal and Interzonal', in J. Kerr Pollock (ed.) *Change and Crisis in European Government,* New York: Rinehart & Company 1949, p. 33.
[41] 'Proclamation No. 3: Fundamental Principles of Judicial Reform', *Official Gazette of the Control Council for Germany*, 29 October 1945 - No.1, pp. 19-21.
[42] A. Schönke, 'Einige Fragen der Verfassung der Strafgerichte', *Süddeutsche Juristenzeitung* 1946, p. 63.
[43] Art. 3, 'Law No. 4: Reorganisation of the German Judicial System', *Official Gazette of the Control Council for Germany*, 30 November 1945- No. 2, pp. 26-27.
[44] K. Kleinraum, 'Rechtsnatur und Rechtswirkungen der Beschränkungen deutscher Gerichtsbarkeit durch das Besatzungsrecht', *Deutsche Rechts-Zeitschrift* 1948, p. 232.
[45] H. Neidhard, 'Die Rechtspflege in der Gesetzgebung der amerikanischen Zone', *Deutsche Rechts-Zeitschrift* 1946, p. 84.

The rule of law lacked the element of the full restoration of judicial independence, which remained restricted in order to ensure that the judiciary complied with the concepts of the rule of law, and ensure the maintenance of a spirit averse to National Socialist ideals in the administration of justice. Military Government Law No. 2 thereby allowed for far-reaching intervention, which affected the normal operation and internal affairs of the German administration of justice. Meanwhile, judicial independence was to be promoted as long as German judges complied with the objectives of the military occupation powers.[46] The occupation powers maintained unlimited power of supervision over German courts, such as the power to remove a judge from office and to examine judgments by German courts, which effectively imposed considerable limitations until German judicial independence it was fully restored at the end of the military occupation.

The Minister-President of Hesse expressed how the restoration of an independent judiciary was the most important element in reinforcing law and justice in post-war Germany, which was to fulfill the spirit and precepts of the rule of law. The dispensation of justice that was restored in Germany served the ideals of the rule of law, although under a different form of law introduced under the occupation regime in which the application of Control Council and military government law took precedence over German legislation.[47]

The principle of judicial independence, the freedom of a judge to administer justice without interference from executive control, was one of the main occupation objectives in the sphere of legal reconstruction.[48] It was the avowed policy of the American military government to foster the independence of the German judiciary by allowing courts the freedom to interpret and apply the law, and to limit military government control to "the minimum consistent with the accomplishment of the aims of the occupation."[49] American military government policy was to avoid interfering in the operation of German courts, except in cases involving the serious interests of occupation authorities.[50] Judges were to remain politically neutral and impartial.[51]

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[46] H. Röhreke, 'Die Besatzungsgewalt auf dem Gebiete der Rechtspflege', (Diss: Eberhard-Karls-Universität zu Tübingen 1950), p. 44.
[47] 1126, Wiesbaden. Hessisches Hauptstaatsarchiv. "Radio-Rede [Geiler] über Deutschland als Rechtsstaat" (n.d.).
[48] K. Loewenstein, 'Justice', in E. H. Litchfield (ed.) *Governing Postwar Germany*, Ithaca: Cornell University Press 1950, p. 250.
[49] D. L. Freeman, *Hesse: A New German State*, Frankfurt-am-Main: Druck und Verlaghaus 1948, p. 134.
[50] *Monthly Report of the Military Governor, U.S. Zone*, 20 November 1945, No. 4.
[51] H. E. Rotberg, 'Entpolitisierung der Rechtspflege', *Deutsche Rechts-Zeitschrift* 1947, p. 107.

The reopening of the German courts became a pressing task as the military government judicial organisations became overburdened with cases.[52] At the end of May and in early June 1945, the first county level and appeal courts began to operate throughout Germany in order to help alleviate the workload of military government courts.[53] The next major step was restoring the German administration of justice, which was the reconstruction of a permanent judicial organisation in each Land. German courts thus began adjudicating criminal cases that dated from just before and just after the beginning of the military occupation to the time the courts were reopened.

Jurisdiction in criminal matters was restricted in certain cases.[54] All offences of a political character and certain types of civil cases were removed from the jurisdiction of these courts pending the approval of the military government. Any attempt at continuing the lawlessness and arbitrariness of the National Socialist regime or maintaining the National Socialist Weltanschauung in the administration of justice was to be penalised severely.[55] Judges in every court were also instructed to follow the guidelines and regulations issued by the military government.

The first instance appeal court presidents were to exercise supervisory and disciplinary authority in accordance with German law at their discretion, subject to military government instruction, over all judicial personnel in the area of jurisdiction, until the president of a highest appeal court could assume authority.[56] The appeal court presidents also directed the reorganisation of the judicial organisations by providing the local government with recommendations regarding the county courts that were to resume functioning, supervised the allocation of judicial personnel that remained subject to the denazification process, and the distribution of business for those courts.[57]

While the first German courts were opened as a matter of expediency, permanent Land judicial organisations were to be reestablished. The structure of the post-war

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[52] C. F. Latour & T. Vogelsang, *Okkupation und Wiederaufbau; die Tätigkeit der Militärregierung in der amerikanischen Besatzungszone Deutschlands, 1944-1947*, Stuttgart: Deutsche Verlags-Anstalt 1973, p. 78.
[53] Starr, *Denazification, Occupation and Control of Germany, March-July 1945*, pp. 121-122.
[54] Z45F 117/56-7/7, Koblenz Bundesarchiv. Legal Form IJ 1. Military Government – Germany; Supreme Commander's Area of Control; Instructions to Judges No. 1.
[55] Art: 2, 'Law No. 4: Reorganisation of the German Judicial System', *Official Gazette of the Control Council for Germany*, 30 November 1945 - No. 2, p.26.
[56] 460/568. Wiesbaden. Hessisches Hauptstaatsarchiv. Betrifft:,'Berichte an die Militärregierung', 28 July 1945.
[57] 460/568. Wiesbaden. Hessisches Hauptstaatsarchiv. 'The Landgericht president, Frankfurt-am-Main to the Military Government Legal Department at Frankfurt-am-Main', 6 August 1945.

justice system in each Land was outlined in the Control Council Legal Division`s "Plan for the Administration of Justice in the United States Zone", issued on 4 October 1945.[58] This plan set forth provisions for the establishment of a judicial organisation operated by German authorities. The traditional jurisdictions of German courts were to be maintained, and a structure for the reorganisation of the judicial organisation in each Land. Other essential principles included the military government policy of establishing and maintaining the independence of the German judicial organisation, and the German assumption of responsibility for the establishment and functions of the administrations of justice.[59]

The implementation of the provisions of the plan rested with the authority of the Land Ministers of Justice.[60] This plan required that a Minister of Justice would function as the leading administrator of the judicial organisation in each Land.[61] This minister was charged with handling the administrative affairs of the judicial organisation, the operation of the courts, and the appointment of judges.[62] New legislative developments could be also applied by the post-war German judicial organisation. However, the military government retained the power to appoint or dismiss any judge. In the interest of maintaining judicial independence, the Ministers of Justice were prohibited from intervening in judicial functions or in the appointment of judges. Disciplinary courts for all judicial personnel were to be established at the appeal courts and one highest appeal court in each Land.[63]

The local military government detachment in each Land supervised the function of those separate judicial organisations.[64] Operation of the post-war German judicial organisation at the Land level was to be directed by the newly established Land Ministry of Justice.[65] The transfer of direct responsibility for the judicial organisations to the Land Minister of Justice also represented the first step toward the restoration of

[58] 'Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen', p.120.
[59] 463/929. Wiesbaden. Hessisches Hauptstaatsarchiv. 'Headquarters, U.S. Forces, European Theater. Plan für die Justizverwaltung, amerikanischen Zone', 4. Oktober 1945.
[60] 463/929. Wiesbaden. Hessisches Hauptstaatsarchiv. 'General Akten über Verfassung', 5. November 1945.
[61] 463/929. Wiesbaden. Hessisches Hauptstaatsarchiv. 'Headquarters, U.S. Forces, European Theater. Plan für die Justizverwaltung, amerikanischen Zone', 4. Oktober 1945.
[62] K. Loewenstein, 'Reconstruction of the Administration of Justice in American-occupied Germany', *Harvard Law Review*, 1947–1948 - Vol. 61, p. 429.
[63] 463/929. Wiesbaden. Hessisches Hauptstaatsarchiv. 'Headquarters, U.S. Forces, European Theater. Plan für die Justizverwaltung, amerikanischen Zone', 4. Oktober 1945.
[64] 463/929 Wiesbaden. Hessisches Hauptstaatsarchiv. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.
[65] M. Stolleis, 'Rechtsordnung und Justizpolitik: 1945–1949', in N. Horn (ed.) *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag* Vol. 1, Munich: C. H. Beck'sche Verlagsbuchhandlung 1982, p.396.

judicial sovereignty,[66] with the Minister of Justice functioning as the leading authority of each Land administration of justice.[67] Since the plan did not include provisions for courts to review administrative disputes or constitutional controversies, those branches of the judicial organisation and their functions in each Land were developed separately. Further developments of the Land judicial organisation would take place upon the reconstitution of permanent Land governments with separate constitutions.
A Supreme Constitutional Court was to be established in each Land, which was charged with the task of defending the provisions of the constitution.[68] They were to judge the constitutionality of legislation, what might constitute the violation of fundamental rights, the integrity of popular elections, and cases involving constitutional disputes arising from the constitution or laws. The jurisdiction of the constitutional court also extended to cases of impeachment for members of the Land governments who had violated the constitution, cases involving the constitutionality of Land legislation, cases involving the integrity of legislative elections, and cases involving judges accused of professional neglect or acting contrary to the constitution.[69] They were also empowered to remove judges from office upon the request of the state assemblies if they did not exercise the functions of their office in accordance with a democratic spirit.[70]

These constitutional courts served as a check upon public authority and legislation enacted by the Land governments while defending the principles of the constitution. The establishment of the constitutional courts also mitigated the ordinary courts' claims of the right to judge the constitutionality of governmental enactments. This had been one of the most dangerous features of the justice system in the Weimar Republic, when reactionary judges used that claim to sabotage progressive measures, citing their right of judicial independence.[71] This new institution hereby enforced uniform interpretations of the law, [72] and thus established protection against problematical conduct by jurists that could be detrimental to the post-war administration of justice.

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[66]Loewenstein, 'Reconstruction of the Administration of Justice in American-occupied Germany', *Harvard Law Review* , 1947–1948 - Vol. 61, p. 428.
[67] RG 260 OMGUS, 17/210-2/6, Wiesbaden. Hessisches Hauptstaatsarchiv. APO 758. Subject: 'Administration of Justice, Land Greater Hesse', 20 November 1945.
[68] D. Gosewinkel, *Adolf Arnt: Die Wiederbegründung des Rechtstaats aus dem Geist der Sozialdemokratie (1945-1961)*, (Diss. Phil.: Universität Freiburg , 1990), p. 134.
[69] Verfassung des Landes Hessens, VIII. 'Der Staatsgerichtshof', Art. 131, Gesetz und Verordnungsblatt für das Land Groß-Hessen (1946): 238.
[70] Ibid, VII 'Die Rechtspflege', Art. 127: 237.
[71] W. Friedmann, *The Allied Military Government in Germany*, London: Stevens & Sons 1947, pp. 82-83, 10.
[72] J. S. Gaab, *Justice Delayed: The Restoration of Justice in Bavaria under American Occupation, 1945-1949*, New York: Peter Lang 1999, p. 133.

Another institution introduced was a system of administrative courts that would provide an additional judicial safeguard to affirm the division of the legislative, executive, and judicial powers of each state. The role of these courts was to adjudicate in controversies concerning the rights of an individual who had been affected by an act committed by a public authority. This upheld the rule of law by providing for the defense of an individual's constitutional rights. These administrative courts could also act independently of governmental control, just as the ordinary law courts,[73] and were to be re-established in each Land.[74]

The institution of administrative courts was confirmed at the national level: Control Council Law No. 36 of 10 October 1946 on "Administrative Courts" enabled these to be re-established throughout Germany and in Berlin. National Socialist legislation regarding administrative courts was abolished upon the enactment of this law.[75] Control Council Law No. 36 confirmed the existing reform of the administrative courts that had already been reopened in American occupied Germany, where the American military government had pressed for their rapid restoration.[76]

The NSDAP had considered administrative courts to be a hindrance to the furtherance of National Socialist justice, and therefore had limited their responsibilities. Consequently, the legal authority of administrative courts to protect the rights of individuals and public bodies had been almost completely eliminated. The restoration of protection against unlawful actions by state authorities was an important rehabilitation task, since it would lead to the standardisation of laws[77] governing the structure and responsibility of the administrative courts in each of the three Länder.[78] The revision of the Administrative Code was completed on 17 September 1945, whereby all traces of National Socialist ideology were removed.[79] The central element of administrative court reform was the extension of their jurisdiction, making them responsible for ensuring the protection of rights in disputes concerning public law outside of constitutional law.[80] The principle of having all incriminating administrative actions subject to legal action had only been

[73] Loewenstein, 'Justice', p. 239.
[74] 501/1892, 'Wiesbaden. Hessisches Hauptstaatsarchiv. Subject: Reopening of Administrative Courts in Land Greater Hesse,' 25.9.1946. Tgb: Nr. M845/46, Ku/St.
[75] 'Law No. 36: Administrative Courts', *Official Gazette of the Control Council*, 31 October 1946 – No.17, p. 183; *Monthly Report of the Military Governor, U.S. Zone*, 31 October 1946, No. 16.
[76] W. Bauer, 'Wiederaufbau der Verwaltungsrechtspflege,' *Süddeutsche Juristenzeitung* 1946, p. 150.
[77] Bauer, 'Wiederaufbau der Rechtspflege', p. 149.
[78] Ibid, p. 152.
[79] Clay, *Decision in Germany*, p. 248.
[80] G. Edelmann, 'Der Einfluß des Besatzungsrechts auf das deutsche Staatsrecht der Übergangszeit (1945–1949)', (Diss.: Johann Wolfgang Goether-Universität 1955), p. 46.

implemented in a few German Länder in the nineteenth century. The introduction of courts throughout Western Germany, the complete organisational separation of the jurisdiction of the administrative courts from the state, and the absolute judicial independence of those courts were significant developments of constitutional law in the Federal Republic of Germany.[81]

Regulations governing criminal law and procedure in American occupied Germany reverted to those that had been in force before 1933. However, the most notable achievement regarding reforming the law was the revised Code of Criminal Procedure.[82] Technical improvements were introduced into the new code, such as those that substantially strengthened the rights afforded to defendants, and divesting police authorities of their former power to enact legislation and adjudicate in certain offences, which had been extended and abused during the National Socialist regime.[83] These conditions were to be removed from police jurisdiction, in order to prevent arbitrary or politically motivated abuse.[84]

The reopened German courts administered justice according to German law that remained in force, unless the Allied Control Council, the American military government, or a Land government repealed or suspended aspects of the law or individual laws. The first Allied Control Council measures in the autumn of 1945 abolished the most notorious examples of National Socialist legislation. While initial military government legislative enactments followed the narrow range of legal objectives outlined in the Potsdam Protocol, they would not suffice to bring about a comprehensive reform of German law.[85] The problem of staging a thorough reform of German law was scrutinising all the National Socialist legislation that would have to be abolished. Although there had been limitations in the application of laws in the Weimar Republic, it retained salience as a model of the original German administration of justice.[86] Detailed planning for the denazification of German law only began after the occupation had begun,[87] and was implemented unsystematically. The denazification of German law was thus initially limited to eliminating the "political" and "racial" legislation of the National Socialist regime.

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[81] B. Diestelkamp & S. Jung., 'Die Justiz in den Westzonen und der frühen Bundesrepublik,' *Aus Politik und Zeitgeschichte* 13, 24 March 1989, p. 20.
[82] *Monthly Report of the Military Governor, U.S. Zone*, 20 October 1945, No.3.
[83] Loewenstein, 'Law and the Legislative Process in Occupied Germany', pp. 1012-1013; 1018-1019.
[84] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No. 7.
[85] Loewenstein, 'Law and the Legislative Process in Occupied Germany', pp. 736–737.
[86] Burleigh, 'The Third Reich: A New History', p. 152.
[87] Z45F 11/5-2/1. Koblenz, Bundesarchiv. RG 260 OMGUS, LD. Folder Title: Legal Division History. "Interview with Dr. Loewenstein."

As a result, while the Land governments were enacting a post-war body of legislation, National Socialist legislation remained in force until it had been expressly abolished. The Control Council Legal Division considered three approaches for reforming the body of German law. The most convenient and simple approach would have been a wholesale repeal of all legislation that had been enacted after 30 January 1933. However, that was not practical, since it would have removed technical innovations that would also serve the purpose of occupation authorities and post-war German governments.[88] For example, the law on juvenile courts of 1943 was maintained, with modifications introduced by the military government in 1945.[89] However, there remained the question of how it was to be carried out. A second approach involved the examination of each legislative topic and every enactment of German law for National Socialist content. That approach was accepted by the Control Council, but new difficulties arose with regard to replacing repealed National Socialist legislation or provisions with new, more appropriate modifications. The fundamental question was whether the new modifications were to be drawn from the pre-1933 body of German law, if any had existed, or whether new improvements of technique or substance were to be introduced. If new legislation was to be introduced, the next question concerned whether German authorities or the occupation power should introduce that legislation. The Control Council Legal Division concluded that it would examine individual laws for possible revision. The Ministries of Justice of the Länder in the U.S. zone lacked the manpower for the task, and there was no single German agency to operate in the legislative field for Germany as a whole. Legal unity in Germany could not be achieved, since there was also no machinery for coordinating the legislation of the seventeen German Länder.[90]

This process involved examining each legislative enactment of German law for National Socialist content. Military government lawyers composing a German Law Revision Committee undertook the task of the denazification of individual laws, to be dealt with either at the Control Council or the zonal military government level, selecting subjects at random, without actually determining which subjects were appropriate for either Control Council or zonal legislation.[91] The Committee was responsible for examining German legislation, making recommendations to the Control Council Legal Division for the elimination of National Socialist legislation,

[88] Loewenstein, 'Law and the Legislative Process in Occupied Germany', pp. 736–737.
[89] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4. Oktober 1945.
[90] Loewenstein, 'Law and the Legislative Process in Occupied Germany', pp. 737–738.
[91] Ibid, pp. 738–739.

and substituting appropriate provisions where necessary.[92] The American military government also enlisted the assistance of the Ministries of Justice of the Länder in preparing for the denazification of German legislation by requesting them to provide lists of National Socialist enactments.[93]

This approach was considered inadequate, and thus a new plan for legislative reform was developed by the Control Council during 1947 by which the entire body of law was to determine whether individual enactments would require outright repeal, partial abrogation, or amendment,[94] such as purging the most flagrant National Socialist alterations to the criminal code through Control Council legislation.[95] The criminal code otherwise essentially remained unchanged,[96] while the Control Council did not intend to undertake a thorough reform of German criminal law. Further reform was to be limited to provisions that were expressions of National Socialist or militarist ideologies,[97] while maintaining legislation that was enacted during the National Socialist regime that was found to be progressive and beneficial.[98]

As a result of rising Cold War tensions and unresolved disputes regarding the post-war reconstruction of Germany, the operations of the Control Council representing four-power cooperation in Germany became permanently suspended. The Control Council completely ceased to function after 20 March 1948, when the Soviet representatives closed its last meeting[99] in reaction to the failure of four-power cooperation. Future legislative reform in American occupied Germany would thereafter be relegated to the U.S. occupation and German authorities at the zonal and Land levels.

Regardless of developments at the international level, greater responsibility was also transferred to the German judicial organisations in each Land through widening their jurisdictions. The military government supervised the function of German courts in

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[92] E. Plischke, 'Denazification Law and Procedure', *American Journal of International Law*, October 1947 - Vol 14, p. 811.

[93] Z45F 17/56 RG 260/OMGUS, Koblenz, Bundesarchiv. Provenance: OMGUS, LD, LA Br., Folder Title: LA 91 The German Government, German Courts. Subject: Reform of German Law, APO 633, US Army, 9 August 1946.

[94] Loewenstein, 'Law and the Legislative Process in Occupied Germany', pp. 740-741.

[95] 'Law No. 11: Repealing of Certain Provisions of the German Criminal Law', 30 January 1946, *Official Gazette of the Allied Control Council for Germany* No. 3 (31 January 1946), pp. 55-57; 'Law No. 55: Repeal of Certain Provisions of Criminal Legislation', 20 June 1947, *Official Gazette of the Control Council for Germany*, 31 July 1947 - No. 16, pp. 284-286.

[96] 'Zur Auswirkung der Gesetzgebung der Besatzungsmächte auf das deutsche Strafgesetzbuch', *Süddeutsche Juristenzeitung* 1946, p. 121.

[97] Z1/230. Koblenz, Bundesarchiv. Office of the Military Government for Germany (U.S.), Legal Division APO 742, 27 September. Subject: Revision of the German Criminal Code.

[98] R. W. Kostal, 'The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946', *Law and History Review* 2011 - Vol. 29 no. 1, p. 31.

[99] *Monthly Report of the Military Governor, U.S. Zone*, March 1948, No. 33.

order to prevent misuse or abuse of judicial responsibilities, which comprised an integral part of the judicial organisation.[100] German courts in each Landgericht, the first instance appeal court, district submitted reports to the military government, which the Minister of Justice[101] was responsible for preparing and submitting to the Chief Legal Officer of the Land military government office. These reports consolidated all information pertaining to the courts, the office of the public prosecutor, and the personnel thereof in each Oberlandesgericht, the second instance appeal court, districts.[102]

The military government exercised its control over German courts through supervision, guidance, and regular inspections.[103] Routine supervision entailed military government legal officers making unannounced visits to German courts to observe proceedings, regularly inspecting court registers, and case files to determine the accuracy of the monthly reports submitted to the Land Military Government Office. Moreover, there were periodical investigations of cases in which the public prosecutors had failed to act in order to determine whether cases had been dropped for justifiable reasons.[104] Although the military government supervision at the Land level was insufficient due to the lack of trained personnel,[105] the military government was encouraged by the fact that "spot checks" at the courts and offices of public prosecutors did not normally reveal any irregularities.[106] The Land ministers of justice, who were noted by the military government to be "first-rate people" and "convinced anti-Nazis", also compensated for the shortcomings of military government supervision of German courts[107] while internal controls of the administration of justice were operated by German legal authorities.[108]

The function of hearing appeals from the lower courts became increasingly important during the occupation, since reopened German courts in American occupied Germany passed conspicuously mild sentences that did not reflect the objective

[100] Loewenstein, 'Reconstruction of the Administration of Justice', pp. 438-439.
[101] 460/568. Wiesbaden, Hessisches Hauptstaatsarchiv. 313a E-Bl, 19 Betr.: Wochen und Monatsberichte, 16. Februar 1946; Z1/1289, Koblenz, Bundesarchiv. Office of the Military Government for Germany (U.S.), Legal Division APO 742, 3 June 1946.
[102] 460/750. Wiesbaden, Hessisches Hauptstaatsarchiv. American military government for Germany; Instructions to Military Government; General. 1 January 1946.
[103] Z45F 11/5-2/1. Koblenz, Bundesarchiv. OMGUS, LD. Legal Division History.
[104] Loewenstein, 'Reconstruction of the Administration of Justice', p. 439.
[105] Z45F 11/5-2/1, Koblenz, Bundesarchiv. OMGUS, LD. Legal History. Interview with Dr. Karl Loewenstein.
[106] Freeman, *Hesse: A New German State*, p. 135.
[107] Z45F 11/5-2/1. Koblenz. OMGUS, LD. Legal History. "Interview with Dr. Loewenstein".
[108] Kostal, 'The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946', pp. 37-39.

meaning and purpose of sentencing in accordance with the facts in certain cases.[109] This recurring problem, which reached crisis proportions, was considered to be a symptom of the judiciary's reaction to the past, when excessively severe penalties were imposed by courts of the National Socialist regime.[110] The military government could intervene in German court decisions to prevent violations of Control Council or military government enactments, but German appeals courts made the final decisions considering errors in the application of the law or the use of judicial discretion. In the event that a German court perpetrated a flagrant violation of military government enactments or the principles of a democratic justice system, the military government could intervene directly by either reversing or revising a court judgment. In practice however, such intervention seldom occurred[111] in American occupied Germany.

Confidence in the post-war German administration of justice was severely shaken by the judgment rendered on 21 November 1946 at the Offenburg regional court in French occupied Germany in the case against Heinrich Tillesen for his part in the murder of the former finance minister Matthias Erzberger became the first German court verdict that was abrogated during the military occupation of Western Germany.[112] The judge in the initial Tillesen trial before the verdict was overturned had been deficiently in his adherence to post-war standards for the administration of justice, leading to this example of a miscarriage of justice as a consequence of the tradition of legal positivism in the German legal environment. According to legal positivism, the law is a manifestation of the authority of the state, recorded in codes and statutes and interpreted by the judiciary in separate cases, in contrast to law based on a system of precedents, as in common law.[113] A law is interpreted solely according to how it is recorded, without questioning the validity of its intrinsic justice by consciously reasoning with the values of democracy and morality.[114]

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[109] A. Arndt, 'Das Strafmaß', *Süddeutsche Juristenzeitung* 1946, p. 30.
[110] A. Arndt, 'Das Strafmaß', *Süddeutsche Juristenzeitung* 1946, p. 30.
[111] 'Das Besatzungsregime auf dem Gebiet der Rechtspflege', Tübingen: Institut für Besatzungsfragen Tübingen, 15 November 1949, pp. 28–29; H. Röhreke, 'Die Besatzungsgewalt auf den Gebiete der Rechtspflege', (Diss.: Eberhard-Karls-Universität zu Tübingen, 1950), p. 44.
[112] M. Broszat, 'Siegerjustiz oder strafrechtliche 'Selbtsreinigung'? Aspekete der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit 1945-1949', *Vierteljahrshefte für Zeitgeschichte* 1981(4), pp. 496-499; 'LG Konstanz', *Süddeutsche Juristenzeitung* 1947-2, p. 337; 'Zur Auslegung des Kontrollratsgesetzes Nr. 10', *Deutsche Rechts-Zeitschrift* 1947-8, pp. 267-270.
[113] J. Noakes & G. Pridham. *Documents on Nazism: 1919–1945*, New York: Viking Press 1974, pp. 226-227.
[114] K. Loewentein, 'Justice', in E. H. Litchfield (ed.) *Governing Postwar Germany*, Ithaca: Cornell University Press 1950, pp. 252-254.

Legal positivism allegedly made the German judiciary defenceless against laws containing arbitrary or illegal content, because judges considered themselves bound by the principle "law is law", just as "orders are orders" binds soldiers. That meant that judges served the value of upholding the law of the state, without upholding the principles of justice [115] or discerning the discrepancies between positive law promulgated by the legislature of the state and the principles of "natural law" not set forth in definitive provisions. Although judges are bound by the laws enacted by the executive authority of the state, their obedience to the law cannot be compared to soldiers subject to military orders. A judge is obliged to decide what is just. The correct decision is to be made within the context of the standards of the law and justice. A judge who applied laws that contravened the principles of justice also contravened the responsibilities of judicial office, and served merely as an extension of the executive authority.[116] That indictment applied especially to judges who took part in the trials conducted by the Sondergerichte, "special courts", and the Volksgerichtshof, the People's Court, which were responsible for trying various types of political offences, as well as judges in the ordinary law courts who had conformed to the standards of the National Socialist administration of justice, and thereby contributed to upholding the interests of the regime.

Postwar German courts began to deviate from the trend of employing legal positivism by considering the concept of natural law in making their judgments, and there were not any objectionable rulings in American occupied Germany. In one example, reasoning according to the spirit of natural law was applied by the Wiesbaden Amtsgericht (county court) in a judgment pronounced on 13 November 1945. The plaintiff in the case had demanded restitution of property expropriated from her parents, who had perished in a concentration camp. This court ruled that a restitution complaint was only justifiable if the plaintiff and other related legal heirs were the owners of the property. In this case, the property had been formerly owned by Jews and had been confiscated under the force of National Socialist legislation. Laws dealing with property on the basis of race had been abolished under military government legislation, but there was no defined approach for dealing with the consequences of laws that previously had been in force. The court therefore decreed that there were rights of individuals according to the tenets of natural law, which the state cannot rescind through legislation, including the right to private property. Hence, the laws declaring Jewish property forfeit contravened natural law, and therefore had been invalid or unjust from the time they had been enacted. It followed

[115] G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristenzeitung* 1946, pp. 105, 107.
[116] H. Coing, 'Zur Frage der strafrechtlichen Haftung der Richter für die Anwendung naturrechtswidriger Gesetze', *Süddeutsche Juristenzeitung* 1946, pp. 61–62.

that the finance office that was holding the property was not authorised to dispose of expropriated Jewish property, since it was not holding the property with the consent of the rightful owner.[117]

While all German law courts were entrusted with administering the law independently, the U.S. military government remained overseeing the restoration of the post-war German judicial organisation, and German courts of appeal served the function of highest legal authority, holding the power to revise dubious court decisions, and ensured appropriate application of the law. By the end of January 1946, the restoration of the German judicial organisation was determined to have reached a stage where Land Ministers of Justice could assume direct responsibility for the operation of German courts. An increasing number of cases were transferred from military government courts once the great majority of German courts had been reopened.[118] The complete restoration of the Land judicial organisations was followed by measures regulating the operation of military government courts as the jurisdictional limitations of German courts were gradually extended, thus establishing greater judicial responsibility of the German judicial organisation.

The first jurisdictional limitations that were imposed under military government legislation were extended by the enactment of additional military government legislation,[119] regulating the relationship between the German courts and military government courts that operated alongside them.[120] Restoring the functions of the German judicial organisation continued by further widening jurisdiction in different types of cases,[121] as German courts could be empowered to assume jurisdiction in a range of cases when expressly authorized to do so by Control Council or military government legislation, or by order of the Military Government Director of the Land.[122]

The limitations on the jurisdiction of the German judicial organisations did not affect the work of the judiciary in pronouncing judgments. The American military government maintained that the independence of the German judiciary was to be encouraged while military government controls of the German administration of justice were in place. The exercise of those controls was to be limited to an extent that was consistent with protecting occupation forces, accomplishing the aims of the

[117] H. Kleine, 'Wiedergutmachungsrecht', *Süddeutsche Juristenzeitung* 1946, p. 36.
[118] *Monthly Report of the Military Governor, U.S. Zone*, 20 February 1946, No. 7.
[119] Nobleman, 'Administration of Justice', p. 96.
[120] *Monthly Report of the Military Governor, U.S. Zone*, 20 August 1946, No. 13.
[121] Loewenstein, 'Reconstruction of the Administration of Justice', pp. 421-422.
[122] Art. 1, 'Amendment No. 2 to Military Government Law No. 2: Limitations upon the Jurisdiction of German Courts', *Military Government Gazette*, 1 December 1946 - Issue B, p. 1.

occupation, and eliminating undue military government interference in the German administration of justice. These objectives were charged to the Land military government offices.[123]

A permanent safeguard against potential abuses of the application of law was introduced with the restoration of jury courts. The formation of jury courts at the county and appeal court levels would take place upon the instruction of each Land Minister of Justice[124] in accordance with the revised Criminal Code that reaffirmed the principles that had been in place before 30 January 1933, subject to amendments deemed necessary according to local conditions.[125] The participation of lay jurors in judicial proceedings, which had been eliminated under the National Socialist regime, was again to be an important factor in the administration of criminal justice.[126]

Greater responsibility was also conferred upon the Land judicial organisations as the restoration of constitutional government led to the administrations of justice in each acquiring greater freedom of action. Indirect government by the American military government ended following the promulgation of American military government Proclamation No. 4 on 1 March 1947 in view of these changed conditions.[127] Military government jurisdiction was substantially reduced to three fields: international agreements to which the U.S. was a party, four-power legislation, and powers reserved to the American military governments for implementing the basic policies of the occupation.[128] Additional groups of minor criminal cases also continued to be transferred from the jurisdiction of American military government courts to that of the German courts throughout 1947 and 1948,[129] extending German court jurisdiction

[123] Z45F 17/56-3/7, Koblenz, Bundesarchiv. RG 260/OMGUS, OMGUS LD, LA Br. LA 91, The German Government, German courts, 015 (AG), 20 November 1946. Subject: Supervision of German Courts.
[124] 'Die Gemeinsame Gesetzgebung der Länder', *Süddeutsche Juristenzeitung* 1946, p. 17.
[125] RG 260 OMGUS, 17/210-3/3, Wiesbaden, Hessisches Hauptstaatsarchiv. APO 633. Subject: Enactment of German Codes for Administration. 11. Februar 1946.
[126] Z1/1282. Koblenz, Bundesarchiv. 'Wieder Geschworene und Schöffen', Nr. 46588 Frankfurter Rundschau Nr. 132, 11.11.47.
[127] 'Proclamation No. 2', Art. 3, *Military Government Gazette*, Germany, United States Zone ,1 June 1946 - Issue A, p. 3.
[128] *Monthly Report of the Military Governor, U.S. Zone*, 31 March 1947, No. 21.
[129] 17/211-2/3, RGO 260 OMGUS. Wiesbaden, Hessisches Hauptstaatsarchiv. Military Government, Germany; Regulation No. 3 Under Military Government Law No. 2, as amended'; Monthly Report of the Military Governor, U.S. Zone, 31 July 1947, No. 25; Monthly Report of the *Military Governor, U.S. Zone*; February 1948. No. 2; 463/929. Wiesbaden, Hessisches Haupstaatsarchiv. 3120 – Iva 257. Betr.: 'Zuständigkeit der deutschen Gerichte', 23 January 1948; RG 260 OMGUS, 8/189 – 3/3. Subject: '1948 Historical Report of the Legal Division OMG Hessen'; 8/217 – 1/5 RG 260 OMGUS. Wiesbaden, Hessisches Hauptstaatsarchiv. Subject: 'Jurisdiction of German Courts', 24 August 1948; 463/929. Wiesbaden, Hessisches Hauptstaatsarchiv, 'Allgemeine Ermächtigung gemäß Art. VI Abs. 10 des Militärregierungsgesetzes Nr. 2', 19 September 1948.

through either amendment of occupation law or administrative revision of the categories of cases that had been withdrawn from the jurisdiction of German courts.[130]

The German judicial organisations had gained greater responsibility from the beginning of the occupation, but complete independence could only be restored when all military government controls had been lifted. Diplomatic discussions among the occupation powers led to new political developments for western Germany. The failure of the London Conference of the four occupation powers in December 1947 on reaching a peace settlement with Germany ended expectations that agreement to form a central German government could be reached between the Western Allies and the Soviet government. The Western Allies therefore developed separate plans for the creation of a West German state. Legal developments in western Germany would be integrated into the structure of that new federal state, and the apex of the reconstruction of a West German state would be drafting a federal constitution. The adoption of a Basic Law, the establishment of federal judicial institutions and a federal government ended this phase of the restoration of justice in western Germany.[131] These actions completely rescinded military government legislation and completely restored the independence of the German administration of justice along with the functioning of the independent state of the Federal Republic of Germany on 23 May 1949.

II. Personnel Reconstruction

The restoration of the post-war judiciary took place simultaneously while the apparatus of the Land judicial organisations were re-established. During the process of reconstructing state institutions in American occupied Germany and purging the law of all vestiges of National Socialism, personnel who had served in the National Socialist administration of justice were vetted individually. Although the law had never been re-made in the National Socialist image,[132] it had been irrevocably subverted and compromised by National Socialist values. It was therefore to be purged of those who had supported it by commission or omission. However, this proved to be a very challenging undertaking for two reasons. First, the extent of the association an individual may have had with the NSDAP and the circumstances of this association had to be determined, and if a policy of judicial lustration was to be adhered to, the jurist base of the new decentralised Land judicial organisations would

[130] Z45F 11/5-2/1, Bundesarchiv Koblenz. OMGUS, LD. Legal Division History.
[131] Press and Information Office of the Federal Government, 'The Administration of Justice', *Germany Reports*, Wiesbaden: Franz Steiner 1966, pp. 287-288.
[132] Burleigh, *The Third Reich: A New History*, p. 162.

consequently remain perpetually marred by personnel shortages. This human element of the denazification of justice entailed the questions of how to undertake the reconstruction of the personnel who would staff the restored and denazified post-war judicial organisations. This process inevitably entailed removing personnel from the legal profession who could be considered to be former National Socialists who had aided and abetted the National Socialist regime in destroying the rule of law. However, it remained to be determined how the extent of political guilt could be established, which would contribute to whether individual jurists could be reinstated.
The American occupation authorities attempted to expurgate all trace of National Socialism through both the Nuremberg Trials, and the wider denazification process that demanded a pragmatic approach. One problem posed by the denazification of the judiciary lay in the nature of membership in the NSDAP membership or its affiliated organisations. Because professional associations had become "synchronized" under the regime's control, the German Bar Association had effectively made membership of the NSDAP mandatory to practice.[133]

Many jurists who served during the National Socialist regime, had survived the Second World War, and had not been expelled from the profession would be subjected to the denazification process, as well as to specific measures for the legal profession. Denazifying the legal profession likewise involved the same problems that were encountered in applying the rest of the denazification programme. Tangible evidence had to be produced to determine whether a candidate for reinstatement in the post-war judicial organisation could be considered to be politically compromised in order to remove such individuals from positions of responsibility.

Problems arose involving the interpretation and practical application of military government denazification directives[134] when suitable replacements could not be found for dismissed personnel. This meant that, rather than a response grounded in normative principle, what became required was an approach to damage limitation. In one example in American occupied Germany, the examination of 150 standard denazification Fragebogen (questionnaires) submitted by jurists in Kurhessen revealed that only twenty-five prospects were eligible for appointment. These were then subject to an interview and an investigation.[135] Locating trained and competent substitutes who were "free from Nazi taint" was one of the greatest obstacles to implementing an

[133] Burleigh, *The Third Reich: A New History*, p. 163.
[134] J. R. Starr, *American military government in Germany: Operations during the Rhineland Campaign*, Karlsruhe: U.S. Army Historical Division, European Command 1950, pp. 40-41.
[135] Starr, *Denazification, Occupation and Control of Germany*, p. 46.

"immediate and peremptory denazification"[136], especially since at least eighty percent of German judges, prosecutors and administrative personnel had become NSDAP members by 1945.[137]

At the initial stage of the occupation, most military government detachment commanders were more concerned with restoring a functional local administration than with ideological or judicial hairsplitting. They determined that in many cases, nominal or lower level membership in the NSDAP was not an absolute indicator of an individual's political viewpoint in all cases.[138]. In practice, the removal of jurists from office or their reinstatement at the initial stage of the occupation was predominantly left to the discretion of the military government officer handling a particular case. [139] They decided whether a candidate for reinstatement could be considered trustworthy, rather than mechanically determining the guilt of individuals based on the date of that person's entry into the NSDAP or one of its affiliated organisations. A questionnaire could not reveal how a jurist had behaved in office or how the individual handled cases, including cases of a political nature in which the law had been used as an instrument in the exercise of totalitarian political power. Questionnaires also did not reveal whether someone had represented National Socialist officials or whether an individual's moral and intellectual attitudes indicated subservience or support for the National Socialist regime.[140] It soon became apparent that the standards set at the beginning of the occupation were unattainable.

While membership in the NSDAP or one of its affiliated organisations was not necessarily motivated by acceptance of its tenets, it was also forced upon the legal profession by various laws and regulations enacted by the National Socialist regime. Jurists in the National Socialist regime either accepted National Socialism out of conviction or were compelled to conform and pretend to pledge allegiance to the regime in order to maintain their positions. The latter became Mußnazis, who were not necessarily National Socialists, but had been coerced into joining the NSDAP or one of its affiliated organisations, and had demonstrated loyalty to the National Socialist regime out of circumstances rather than conviction. Many individuals, regardless of their occupation, joined the NSDAP out of fear, to avert suspicion of being disloyal to the regime, or to maintain their means of livelihood, even though

[136] E. Plischke, 'Denazification Law and Procedure', *American Journal of International Law* October 1947 - Vol. 41, p. 817.
[137] Kostal, 'The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946', p.23.
[138] Ibid.
[139] Loewenstein, 'Reconstruction of the Administration of Justice', pp. 448, 455.
[140] Loewenstein, 'Reconstruction of the Administration of Justice', p. 448.

they were politically indifferent.[141] As a result of such pressures, the vast majority of the judiciary joined the NSDAP or demonstrated apparent allegiance to the regime by paying dues to National Socialist organisations. Apart from sheer opportunism, demonstrating allegiance to the National Socialist regime in that manner as concrete outward evidence of political conformity could be considered a form of an "insurance policy against dismissal", and helped maintain continued promotion within the civil service.[142] In one example of political pressure, the Berlin Gauleitung (district office) of the NSDAP ordered that all law graduates would be required to join the NSDAP or one of its affiliated organisations. One such individual responded to that order by joining the Reiter-SA in October 1933, since that organisation emphasised sport rather than the "political" element of its functions.[143]

Uniform regulations for the reinstatement of judicial personnel for Land judicial organisations in American occupied Germany were later set forth in the Plan for the Administration of Justice. The appointment of judicial personnel was charged to the Land Ministers of Justice as the administrative superiors of the judicial organisations in the newly created Länder. Each Land Minister of Justice was made responsible for the appointment of judges and all other judicial personnel, including those selected by the appeal court presidents and state public prosecutors[144] and required the approval of the military government to appoint or remove judges from office.[145] Appeal court presidents were to select lawyers, notaries, and lay judges for their office or practice in the courts in their jurisdictions. Their appointments were subject to prior approval from the military government,[146] retaining the function of screening and approving all applicants on the basis of the individual Fragebogen and denazification regulations prior to their reinstatement into the Land judicial organisations.[147]

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[141] A. Sträter, 'Denazification' *Annals of the American Academy of Political and Social* Science. 260 1948-45, p. 50.

[142] Loewenstein, 'Reconstruction of the Administration of Justice', pp. 443–444; Sträter, 'Denazification', p. 50.

[143] 462/1308, Wiesbaden. Subject: Admission to the Bar, 12 November 1945.

[144] Arndt, 'Die staats–und verwaltungsrechtliche Entwicklung in Groß-Hessen', *Deutsche Rechts-Zeitschrift* 1946, p. 186; 463/1118,Wiesbaden.–Az: 2010–I 22.'Rundverfügung über den Verkehr mit der Militärregierung und die Einstellung von Beamten, Angestellten usw. vom 7. Januar 1946', 7 January 1946.

[145] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4 Oktober 1945.

[146] 463/929, Wiesbaden. Headquarters, U.S. Forces, European Theater: Plan für die Justizverwaltung amerikanische Zone, 4 Oktober 1945; 460/645, Wiesbaden. Betrifft: "Fortzahlung von Gehältern und Lohnen an noch nicht beschäftigte der Justizbehörden", 20 September 1945.

[147] 460/645,Wiesbaden. Betr.: 'Denazifizierung', 16 November 1945; 462/1301, Wiesbaden. Office of the Military Government for Greater Hesse, APO 758. Subject: 'Judicial Officials and Employees; Land Greater Hesse,' 2 January 1946.

The cabinets of Hesse, Bavaria and Württemberg-Baden officially adopted a German denazification law on 5 March 1946 [148] that would guide the denazification programmes in these states thereafter. These would be applied by German authorities separately in each Land under the same terms [149] under the supervision of the American military government.[150] The implementation of this "Law for Liberation from National Socialism and Militarism" through German authorities was intended to bring about a political cleansing on the basis of common principles, in accordance with legally organised proceedings, in which the decisive factor in every case would be subject to an individual examination of overall conduct, rather than external factors.[151] In addition to evaluating cases on an individual basis, the new law would attempt to address the bureaucratic weaknesses of U.S. denazification policy[152] by stressing judicial penalties for crimes, and using a scale of sanctions graded to offences while maintaining the military government mandatory removal categories.[153] Although the purpose of the transition – essentially transitional justice – was that it should be in accordance with legally organised proceedings where the decisive factor of every case would be subject to an individual examination of overall conduct rather than external characteristics, this was rarely the case. It was a move away from the assumption of guilt that had characterised the initial response and towards a pragmatic recognition that vetting on the basis of membership in the NSDAP or in its affiliated organisations alone would effectively deprive the administration of many qualified jurists.

The changed approach under German implementation also recognised that it was impossible to maintain the administration of justice without reinstating jurists from the National Socialist regime, which remained subject to the professional and political qualities of the available applicants. Their reinstatement was determined by denazification tribunals that were supplemented by recommendations for personnel submitted to Land Ministers of Justice through appeal court presidents by leading authorities of the subordinate county courts. [154] Decisions for reinstatement were subject to further scrutiny by judicial officials and the final decision for reinstatement

[148] 1126/19, Wiesbaden. 'Beschluß-Protokoll über die Sitzung der (sic) Kabinetts am 25. Februar 1946'.
[149] *Monthly Report of the Military Government, U.S. Zone*, 20 March 1946, No.8.
[150] *Monthly Report of the Military Governor, U.S. Zone*, 20 July 1946, No. 12.
[151] 1126/17, Wiesbaden. 'Erklärung des Ministerpräsidenten von Gross-Hessen Prof. Dr. Karl Geiler zu dem Gesetz zur Befreiung von Nationalsozialisms und Militarismus', 4. März 1946.
[152] J. Fürstenau, *Entnazifizierung: Ein Kapitel deutscher Nachkriegspolitik*, Darmstadt: Luchterhand Verlag 1969, p. 62.
[153] W. E. Griffith, 'Denazification in the United States Zone in Germany', *Annals of the American Academy of Political and Social Science*, 1950 - Vol. 269, p. 70.
[154] Art. 25, Section 1, Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946, E. Schullze, ed., München: Biederstein Verlag 1947, p. 30.

rested with the Minister of Justices. Hence, only the worst offenders under the Law for Liberation could remain permanently excluded from the Land judicial organisations. Former nominal members of National Socialist organisations would not be affected in the long term. In addition to the problem of acquiring applicants with adequate political records, the professional qualities of available judicial personnel were not always exemplary, since they were either over-age or had been out of practice for years as a result of the Second World War. On the other hand, Ministers of Justice attempted to employ former judges and prosecutors who had had to leave Germany as a result of their racial, religious, or political persuasion, and had expressed a desire to return.[155] The acceleration of the denazification of jurists and the employment of refugee lawyers, such as those who had been expelled from the Sudetenland[156] also made more personnel available, which consequently enabled the courts to deal with cases more expeditiously.[157]

The implementation of the Liberation Law was overshadowed by the underlying problem of the acute personnel shortages among jurists. It became evident that the denazification policy as envisaged at the beginning of the occupation could not be fulfilled while the number of jurists who could be appointed to office was excessively limited. This would lead to a modification of the policy to allow for greater numbers of trained and qualified jurists, regardless of their personal history, to be reinstated in the administration of justice. The unanticipated personnel shortages that emerged during the reconstruction of the justice system undermined the occupation goal of a thorough political cleansing (Art. 22 of the Liberation Law) of every aspect of German public life in the post-war period. In the example of Hesse, the Minister of Justice Georg-August Zinn reported on 26 February 1946 that there had been a total of five hundred and eighty-three judges, public prosecutors at the county and appeal courts in Hesse before 1945, while only two hundred and thirty-five had been appointed by that time, and that there was an urgent need for an additional two hundred and twenty judges and prosecutors. [158] Whereas the Plan for the Administration of Justice required five hundred judges and sixty-nine public prosecutors in Greater Hesse, only two hundred and thirty-three judges, including assistant judges, and fifty-three public prosecutors, including assistant public prosecutors, were appointed after the highest appeal court of Hesse was opened on 23

[155] Z45 F 17/56–3/7 RG 260/OMGUS, Koblenz. AJ 015.2 18 November 1946 HMR/f, Subject: Report on Inspection of German Court in Greater Hesse from 28 October to 4 November 1946.
[156] 'Gemeinsame Gesetzgebung: Stand vom 9.4.1948; Richteramtsbefähigung umgesiedelter und heimatvertriebener Juristen', *Süddeutsche Juristenzeitung* 1948, p. 220.
[157] Monthly Report of the Military Governor, U.S. Zone, 30 September 1947, No. 27.
[158] N. Ernst & K. Moritz (eds.) *NS-Verbrechen vor Gericht: 1945–1955* (Wiesbaden: Kommission für die Geschichte der Juden in Hessen 1978), p. 18.

May 1946.[159] The courts in American occupied Germany remained with only forty percent of total personnel they possessed in 1938 while the numbers of criminal cases had risen sharply.[160] The reconstruction of the judicial organisations was not possible without the necessary personnel,[161] while shortage could not be alleviated, partly due to the number of jurists who had been killed in the Second World War or were still interned in prisoner-of-war camps.[162] The only solution to the problem appeared to be the reinstatement of the capable and qualified judges and prosecutors who had been removed from office under the denazification programme, and it soon became apparent that this would ultimately have to be done.[163]

All those who had been removed from office could make legal claims for reinstatement, unless they had been ruled by a denazification tribunal to be unfit for public service, or had been employed by the Gestapo.[164] Hence, the purpose of de-nazification to permanently block individuals associated with the National Socialist regime from positions of influence, which already had been in decline toward the end of the denazification programme, became virtually meaningless in the long term. The termination of this programme was a tacit admission that the massive political cleansing of a nation was not feasible,[165] while the denazification of jurists in particular was especially obstructed by personnel shortages.

Former members of the NSDAP and its affiliated organisations were reinstated into the judiciary, the Bar Association, and all other functions of the judicial organisations, since permanently barring them from office was impossible, regardless of their political records. Between two-thirds and three-quarters of the 15,000 judges and prosecutors who held office in the Federal Republic of Germany in 1950 were former

[159] 'Der Aufbau der Justiz in der amerikanischen Zone: Groß-Hessen', p. 120.
[160] K. Loewenstein, 'The Reconstruction of Justice in Germany', *Harvard Law Review* 1947-1948 - 61, p. 454.
[161] W. Benz, 'Die Entnazifizierung der Richter', in B. Diestelkamp & M. Stolleis (eds.) *Justizalltag im Dritten Reich*, Frankfurt-am-Main: Fischer Taschenbuch Verlag 1988, p. 124.
[162] Diestelkamp, 'Die Justiz in den Westzonen', p. 23; B. Diestelkamp, 'Kontinuität und Wandel in der Rechtsordnung: 1945–1955', in L. Herbst (ed.) *Westdeutschland 1945–1955: Unterwerfung, Kontrolle, Integration*, München: R. Oldenbourg Verlag 1986, p. 94.
[163] Z45F 17/199–3/41 RG 260/OMGUS, Koblenz. Subject: 'Removal of Nazi Laws and Removal of Nazis from the Judicial System', 17 January 1947.
[164] K. Godau-Schüttke, *Ich habe nur dem Recht gedient: Die 'Renazifizierung' der Schleswig-Holsteinischen Justiz nach 1945*, Baden-Baden: Nomos Verlagsgesellschaft 1993, p. 22; Diestelkamp, 'Justiz in den Westzonen', pp. 27–28; Section 1, Art. 3, "Gesetz zur Regelung der Rechtsverhältnisse der unter Artikel 131 des Grundgesetzes fallenden Personen. Vom 11. Mai 1951," Bundesgesetzblatt I 1951: 308.
[165] J. Herz, 'Fiasco of Denazification' *Political Science Quarterly*, December 1948 - Vol. 63, p. 592; Latour, Vogelsang, *Okkupation und Wiederaufbau*, 179, and Diestelkamp, 'Kontinuität und Wandel in der Rechtsordnung', p. 94.

National Socialists, and some of them were likely to have taken part in injustices.[166] Not any member of the People's Court, a Special Court, or an ordinary court was called to account for administering "terror justice" or for their participation in judicial criminality under the National Socialist regime in the western occupation zones or the Federal Republic of Germany.[167]

The results of the denazification of jurists in American occupied Germany were just as unsatisfactory as with the other professions,[168] while historians have widely acknowledged that the attempts at denazification in post-war Germany was a failure.[169] In spite of this failure to achieve a thorough reform of German public life, the former practices of the National Socialist regime were eliminated in the Land administrations of justice in the American military occupation zone. The terms of the Liberation Law absolved most of the legal profession from being brought to account for their role under the National Socialist regime, even if they had been involved in cases of a political nature, and the implementation of the Liberation Law in practice confirmed their absolution. In spite of the shortcomings of the denazification programme, safeguards within the post-war judicial organisations counteracted potential abuses of judicial authority, and prevented "politically unreliable" jurists from abusing their judicial office.

III. Conclusion

The denazification programmme during personnel reconstruction had ultimately proven to be impossible, while the reconstruction of the administrations of justice was far more successful and thereby took precedence in safeguarding the restoration of the post-war administration of justice. In spite of the shortcomings of the denazification programme, safeguards within the administration of justice counteracted potential abuses of judicial authority, such as the restored right to appeal lower court decisions and the establishment of constitutional courts. Postwar changes in the apparatus of the administration of justice thus prevented politically implicated jurists from abusing their office. As was later demonstrated in post-Communist states,

[166] T. Sommer, 'The Nazis in the Judiciary', in W. Stahl (ed.) *The Politics of Western Germany*, New York: Frederick A. Prager, 1963, pp. 241–242.
[167] Diestelkamp, 'Die Justiz in den Westzonen', p. 26; B. Diestelkamp, 'Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit', in B. Diestelkamp & M. Stolleis (eds.) *Justizalltag im Dritten Reich*, Frankfurt-am-Main: Fischer Taschenbuch Verlag 1988, pp. 133, 145.
[168] Stolleis, 'Rechtsordnung und Justizpolitik: 1945–1949', in N. Horn (ed.) *Europäische Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag* Vol. 1, Munich: C. H. Beck'sche Verlagsbuchhandlung 1982, p.396.
[169] Biddiscombe, *The Denazification of Germany*, p. 217.

this also confirmed that amnesties granted to "normalise" society did not necessarily compromise the subsequent functioning of judicial operations.[170]

The denazification process was the first fully documented attempt a purging[171] of personnel following a regime change. The attempt to reconstruct the administration of justice and to vet jurists in American occupied Germany was very much a learning process both for the occupation powers and legislators who contended with demands for retribution and the infinitely nuanced levels of complicity and attitude. Attempts at neutralising National Socialist influences through the denazification of the legal profession took place simultaneously with the institutional restoration of justice. It became apparent that the scope of the denazification programme was too broad and had become an impossible task to accomplish.[172] Neither the American military government nor German denazification authorities could arrive at a permanent solution to the problem of eliminating all politically implicated personnel. It was not possible to permanently remove all such individuals from office, and it was not possible to change the attitudes of individuals, other than to force a change in the Land judicial organisations, which would then compel jurists to adapt to the new post-war circumstances.

It also became evident that a permanent, legitimate definition of who had been an actual National Socialist would prove unworkable. The denazification programme opened the way for errors in judgment, since it did not provide for a thorough examination of the professional and political records of every jurist who had served under the regime. The question posed to jurists by denazification authorities did not ascertain whether they had administered National Socialist justice, and thereby did not evaluate their professional, rather than political, records, and thus call them to account for their actions accordingly. The denazification of the legal profession, and the broad-sweeping denazification process itself, was a failure in that respect.[173] Nevertheless, despite the shortcomings of the denazification program, the overall reforms that were instituted contributed to the restoring of justice through establishing necessary institutional and legal safeguards. Moreover, post-war jurists could not all

[170] Stan, *Transitional Justice in Eastern Europe and the Former Soviet Union*, p. 6
[171] L. Bickford, 'Transitional Justice', in Sheldon D (ed.) *The Encyclopedia of Genocide and Crimes against Humanity*, New York: Macmillan 2004, p.43
[172] J. F. Napoli, 'Denazification from an American's Viewpoint', *Annals of the American Academy of Political and Social Science* Vol. 264, July 1949, p. 121.
[173] T. Sommer, 'The Nazis in the Judiciary', in W. Stahl (ed.) *The Politics of Western Germany*, New York: Frederick A. Prager 1963, p. 244.

have been instilled with the National Socialist worldview.[174] There is also no indication that erstwhile Nazi jurists allowed National Socialist ideas to influence their application of the law as they accommodated to the post-war state of affairs.[175]

Resuming the effectiveness of the operations of judicial institutions thus took precedence over the political views of individual judicial personnel. The function of the rule of law was supported by established German court jurisdictions for the separate stages of appeals, which could lead to judgements at the highest courts that were provided for by constitutions[176] at the Land levels. It was also unlikely that the political opinions of reinstated jurists could jeopardise the function of the rule of law. Since there was no alternative after the collapse of the National Socialist regime, judges in the Federal Republic of Germany rapidly accepted the new state and its constitution.[177] There was also an absence of any alternative,[178] especially since National Socialist ideology had become discredited, along with legal professionals having being subject to unprecedented professional and moral disgrace during the National Socialist regime[179] while they upheld the interests of the state. Despite the inherent problems with the denazification process, the transition towards an administration of justice could be seen to work as the decentralised judicial organisations began operating during the post-war period. The institutions of the administration of justice that would be operated by jurists, whether or not they were politically implicated, had been successfully denazified, and the former National Socialist laws and practices were eliminated through post-war legislation. Since there was not any evidence of problematic conduct by jurists who remained in office, the new institutional design did not hinder the post-war administration of justice, while any abuses could otherwise be checked by either the military government authorities or the reconstituted appeal courts.

Assessing the success of the restoration of justice in American occupied Germany during the post-war military occupation entailed a two-part process: the administration of justice became operational although the personnel operating it had not been fully lustrated. Identifying those culpable and the gradations within which this culpability was refracted proved to be an enormous task, and individual states have since dealt

[174] Diestelkamp, 'Kontinuität und Wandel in der Rechtsordnung', pp. 94–95; 'Die Justiz nach 1945 und ihr Umgang mit der eigenen Vergangenheit', in B. Diestelkamp & M. Stolleis (eds.) *Justizalltag im Dritten Reich*, Frankfurt-am-Main: Fischer Taschenbuch Verlag 1988, pp. 145–148.
[175] S.P. Huntington, *The Third Wave: Democratization in the Twentieth Century*, Oklahoma: University of Oklahoma Press 1991, p. 121
[176] 'Das Besatzungsregime auf dem Gebiet der Rechtspflege', pp. 45–46.
[177] R. Wassermann, 'Richteramt und politisches System', *Revue d'Allemagne* 1973 - Vol. 5, p. 904.
[178] Huntington, *The Third Wave: Democratization in the Twentieth Century*, p. 6.
[179] Gaab, *Justice Delayed*, p. 132.

with this process in ways that both reflected their immediate experiences and their longer histories.[180] Wherever large-scale regime change occurs, fundamental to the structure of that state is the rule of law and how it is administered - whether capriciously to serve the interests of a dictatorship, or synchronised to foster a given ideology - it remains the first stage in reconstruction after a regime change. When a state's population can be assured of justice administered by jurists of probity, reconstruction can take place on a regional and then the national level, as had taken place in Germany from 1945 to 1949 until the creation of the Federal Republic of Germany. Its success was only limited to the exigencies of the human element of the reconstruction. While this element was less than final, the lessons of post-war Germany indicate that a just and functioning administration of justice can be reconstituted to serve society without wholesale and potentially damaging permanent lustration. The restoration of justice can take place, as it did in the example of American occupied Germany, when citizens could be assured that jurists would administer the law impartially in accordance with representing their interests, as well as upholding the post-war democratic state.

[180] Stan, *Transitional Justice in Eastern Europe and the former Soviet Union*, p. 262.